NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARIO V. VENTURA,

Plaintiff,

Vs.

Plaintiff,

ORDER OF SERVICE; DIRECTING

DEFENDANTS TO FILE

DISPOSITIVE MOTION OR

NOTICE REGARDING SUCH

MOTION

KEVIN POUGH, et al.,

Defendants.

Plaintiff, a state prisoner proceeding <u>pro se</u>, filed a civil rights complaint on May 2, 2005, pursuant to 42 U.S.C. § 1983 and against Menlo Park Police Officers Kevin Pough and Joseph Hinkston, the Menlo Park Police Chief, and the City of Menlo Park. On July 5, 2005, Plaintiff filed a motion to amend the complaint to include additional claims and documentation. On August 8, 2005, Plaintiff filed an amendment to the complaint to add further allegations, which was filed as an amended complaint. On October 19, 2005, the Court directed Plaintiff to file a second amended complaint within thirty days or to notify the court that he wished to proceed with his original complaint, filed on May 2, 2005, and did not intend to include the additional documents and allegations in his complaint.

Order of Service; Directing Defendants to File Dispositive Motion or Notice Regarding Such Motion  $G:\PRO-SE\SJ.Jf\CR.05\Ventura814serv.wpd$ 

Instead of filing a second amended complaint, Plaintiff filed, on November 16, 2005, a motion to proceed with the original complaint, and a motion to add to the complaint. On August 16, 2006, the Court denied his request to add to the complaint, but instead granted him further leave to file a second amended complaint. Plaintiff has not filed a second amended complaint. Consequently, as the Court indicated in the August 16, 2006, order, this matter will proceed on the basis of the original complaint and further leave to amend will not be granted. After reviewing the amended complaint, the Court will order it served upon Defendants.

**DISCUSSION** 

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. See id. § 1915A(b)(1),(2). Pro se pleadings must, however, be liberally construed. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988).

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of state law. See West v. Atkins, 487 U.S. 42, 48 (1988).

Plaintiff alleges that Officers Pough and Hinkston used excessive force upon him during the course of his arrest, and that this use of force was pursuant to the policy and custom of the Menlo Park Police Department and the City of Menlo Park. Having reviewed the complaint, the Court finds that Plaintiff's allegations, liberally construed, state a cognizable claim against Defendants for the violation of his Fourth Amendment rights.

## **CONCLUSION**

For the reasons stated above, the Court orders as follows:

- 1. The Clerk of the Court shall issue summons and the United States Marshal shall serve, without prepayment of fees, a copy of the May 2, 2005, complaint in this matter, all attachments thereto, and a copy of this order upon **Officer Kevin Pough**, **Officer Joseph Hinkston, and the Chief of Police** of the **City of Menlo Park Police Department**, and **the City of Menlo Park**. The Clerk shall also <u>mail courtesy copies</u> of the complaint and this order to the City Attorney's Office of the City of Menlo Park.
- 2. No later than **ninety** (**90**) **days** from the date of this order, Defendants shall file a motion for summary judgment or other dispositive motion with respect to the claim in the complaint found to be cognizable above.
- a. If Defendants elect to file a motion to dismiss on the grounds that Plaintiff failed to exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a), Defendants shall do so in an unenumerated Rule 12(b) motion pursuant to Wyatt v. Terhune, 315 F.3d 1108, 1119-20 (9th Cir. 2003), cert. denied Alameida v. Terhune, 540 U.S. 810 (2003).
- b. Any motion for summary judgment shall be supported by adequate factual documentation and shall conform in all respects to Rule 56 of the Federal Rules of Civil Procedure. Defendants are advised that summary judgment cannot be granted, nor qualified immunity found, if material facts are in dispute. If any Defendant is of the opinion that this case cannot be resolved by summary judgment, he shall so inform the Court prior to the date the summary judgment motion is due.
- 3. Plaintiff's opposition to the dispositive motion shall be filed with the Court and served on Defendants no later than **thirty** (**30**) **days** from the date Defendants' motion is filed.
  - a. In the event Defendants file an unenumerated motion to dismiss

under Rule 12(b), Plaintiff is hereby cautioned as follows:<sup>1</sup>

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The Defendants have made a motion to dismiss pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, on the ground you have not exhausted your administrative remedies. The motion will, if granted, result in the dismissal of your case. When a party you are suing makes a motion to dismiss for failure to exhaust, and that motion is properly supported by declarations (or other sworn testimony) and/or documents, you may not simply rely on what your complaint says. Instead, you must set out specific facts in declarations, depositions, answers to interrogatories, or documents, that contradict the facts shown in the Defendant's declarations and documents and show that you have in fact exhausted your claims. If you do not submit your own evidence in opposition, the motion to dismiss, if appropriate, may be granted and the case dismissed.

b. In the event Defendants file a motion for summary judgment, the Ninth Circuit has held that the following notice should be given to Plaintiffs:

The defendants have made a motion for summary judgment by which they seek to have your case dismissed. A motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your case.

Rule 56 tells you what you must do in order to oppose a motion for summary judgment. Generally, summary judgment must be granted when there is no genuine issue of material fact--that is, if there is no real dispute about any fact that would affect the result of your case, the party who asked for summary judgment is entitled to judgment as a matter of law, which will end your case. When a party you are suing makes a motion for summary judgment that is properly supported by declarations (or other sworn testimony), you cannot simply rely on what your complaint says. Instead, you must set out specific facts in declarations, depositions, answers to interrogatories, or authenticated documents, as provided in Rule 56(e), that contradict the facts shown in the defendants' declarations and documents and show that there is a genuine issue of material fact for trial. If you do not submit your own evidence in opposition, summary judgment, if appropriate, may be entered against you. If summary judgment is granted in favor of defendants, your case will be dismissed and there will be no trial.

See Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff is advised to read Rule 56 of the Federal Rules of Civil Procedure and Celotex Corp. v. Catrett, 477 U.S. 317 (1986) (holding party opposing summary judgment must come forward with evidence showing triable issues of material fact on every essential element of his claim). Plaintiff is cautioned that failure to file an opposition to Defendants' motion for summary

<sup>&</sup>lt;sup>1</sup>The following notice is adapted from the summary judgment notice to be given to pro se prisoners as set forth in <u>Rand v. Rowland</u>, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). <u>See Wyatt v. Terhune</u>, 315 F.3d at 1120 n.14.

judgment may be deemed to be a consent by Plaintiff to the granting of the motion, and granting of judgment against plaintiff without a trial. See Ghazali v. Moran, 46 F.3d 52, 53-54 (9th Cir. 1995) (per curiam); Brydges v. Lewis, 18 F.3d 651, 653 (9th Cir. 1994).

- Defendants shall file a reply brief no later than **fifteen (15) days** after Plaintiff's opposition is filed.
- 5. The motion shall be deemed submitted as of the date the reply brief is due. No hearing will be held on the motion unless the Court so orders at a later date.
- 6. All communications by the Plaintiff with the Court must be served on Defendants, or Defendants' counsel once counsel has been designated, by mailing a true copy of the document to Defendants or Defendants' counsel.
- 7. Discovery may be taken in accordance with the Federal Rules of Civil Procedure. No further Court order is required before the parties may conduct discovery.
- 8. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the Court informed of any change of address and must comply with the Court's orders in a timely fashion. Failure to do so may result in the dismissal of this action for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

United States

District Judge

IT IS SO ORDERED.

DATED: 4/25/08

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